# TITLE 85 EXEMPT LEGISLATIVE RULE WORKERS' COMPENSATION RULES OF THE WEST VIRGINIA INSURANCE COMMISSIONER

## SERIES 18 SELF INSURANCE, SELF ADMINISTRATION AND THIRD PARTY ADMINISTRATORS

#### §85-18-1. General.

- 1.1. Scope. -- This exempt legislative rule addresses employers approved to administer and provide their own system of compensation to their injured employees, pursuant to W. Va. Code §23-2-9. This rule applies to employers who previously were in this status, currently are in this status or enter this status at some point in the future, and to all liabilities of an employer pursuant to being in this status. This rule also applies to the qualifications of third party administrators hired by self-insured employers to help administer workers' compensation claims filed by the injured workers of self-insured employers.
- 1.2. Authority. -- W. Va. Code §§23-2-9; 23-2C-22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the Commissioner and approved by the Industrial Council are not subject to legislative approval as would otherwise be required under West Virginia Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.
  - 1.3. Filing Date. -- July 18, 2008.
  - 1.4. Effective Date. -- August 17, 2008.

#### **§85-18-2.** Purpose of Rule.

The purpose of this rule is to provide for the administration of a system of self-insurance consistent with the specific provisions and purposes of W. Va. Code §23-2-9.

#### **§85-18-3.** Definitions.

As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed and the context expressly indicates that another meaning is intended.

3.1. "Audited financial statements" mean the financial statements accompanied by an independent auditor's report which provide reasonable assurance about whether the audited employer has presented fairly the financial position, results of operations, and cash flows in conformity with generally accepted accounting principles or those of another recognized accounting body. This assurance is derived through a systematic process, governed by generally

accepted auditing standards or Public Company Accounting Oversight Board standards, of objectively obtaining and evaluating evidence regarding assertions about economic actions and events to determine whether (1) financial information is presented in accordance with established or stated criteria, (2) the entity has adhered to specific financial compliance requirements, if applicable, or (3) the entity's internal control structure over financial reporting and/or safeguarding assets is suitably designed and implemented to achieve the control objectives.

- 3.2. "Commissioner" means the Commissioner of Insurance of the State of West Virginia.
- 3.3. "Decision" means a written statement issued by the Commissioner containing the Commissioner's findings of facts and conclusions as to any issue presented to the Commissioner under this rule. Such decisions include, but are not limited to, notices of delinquency and notices of default. Any purported "decision" which is not in writing has no legal effect under this rule. "Decision" does not include a written statement in the form of e-mail.
- 3.4. "Default" for the purposes of a self-insured employer means the failure by a self-insured employer to cure a delinquency after notification within the time specified in the notice.
- 3.5. "Delinquent" means a self-insured employer has failed, without good cause, to timely pay workers' compensation benefits or to make any other payment due under the terms of chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

For purposes of this subsection, "good cause" means the self-insured employer has:

- a. Failed to receive notice of a properly entered order; or
- b. Failed to act on an order that has been entered in substantive error, is on its face obviously in error as to the amount due or mandates the payment of temporary total disability benefits in excess of those permitted by law.
  - 3.6. "Dependent" has the meaning ascribed to that term by W. Va. Code, §23-4-10(d).
- 3.7. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.
- 3.8. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.
- 3.9. "Injury" means compensable injuries or illnesses within the meaning of W. Va. Code §23-4-1 et seq.

- 3.10. "Payments" are obligations of the self-insured employer for workers' compensation benefits to their injured employees or any other obligations due under the terms of chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.
- 3.11. "Payroll" means the term as defined in the most current approved filing of the Commissioner's designated rating organization for workers' compensation.
- 3.12. "Quarter" means the four calendar quarters: January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31 of each calendar year.
- 3.13. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9
  - 3.14. "Industrial Council" is the body created pursuant to W. Va. Code §23-2C-5.

#### §85-18-4. Self Insurance Status.

- 4.1. Self insurance status. An employer may become self-insured if the Commissioner, with the approval of the Industrial Council, determines the employer meets the financial responsibility and procedural requirements set forth in W. Va. Code §23-2-9, and in this rule.
- 4.2. An employer owned by another business may have its self-insured workers' compensation risks guaranteed by a parent, if the relationship between the employer and parent is adequately documented, as determined by the Commissioner, and if the parent can satisfy the financial responsibility requirements set forth in W. Va. Code §23-2-9 and this rule
- 4.3. Any employer granted the privilege of self-insured status shall give security or bond in the form, of the type, and in the amount required by the Commissioner, with the approval of the Industrial Council, pursuant to W. Va. Code §23-2-9 and this rule. Additionally, any employer granted the privilege of self-insured status shall abide by the requirements for maintaining, modifying, or terminating the self-insured status, as set forth in W. Va. Code §23-2-9 and this rule.

#### §85-18-5. Application for Self Insurance.

- 5.1. An employer may apply for self-insured status by filing with the Commissioner an application for self-insured status in the form prescribed by the Commissioner. If an employer relies on the audited financial statements of its parent to be granted self-insured status, the relationship between the employer and the parent must be documented on the application, and the parent company must provide a parental guaranty in a form acceptable to the Commissioner. The required parental guaranty must be received and accepted by the Commissioner before the application for self-insured status can be processed.
- 5.2. A disclosure of the employer's management and financial structures and the employer's audited financial statements for each of the three (3) fiscal years preceding the date of

application must be attached to the application. If a parent business is to insure the employer's self-insured workers' compensation risk, the parent's disclosure of management and financial structures, and its audited financial statements for the three (3) years preceding the date of application must also be attached to the application. The employer shall disclose to the Commissioner all of the business entities acquired, bought, transferred or merged by or into the employer applicant. Failure to disclose this information at the time the application is filed without good cause, as determined in the sole discretion of the Commissioner, may result in rejection of the application

- a. The employer's application, the required audited financial statements and other information must be signed and sworn to by:
- 1. Either the president alone or vice-president and secretary or assistant secretary if the employer making application is a corporation or limited corporation;
  - 2. All of the partners if the employer making application is a partnership;
- 3. If the employer making application is a limited liability company ("LLC"), then by all of the general members;

or

- 4. The owner if the employer making application is a sole proprietorship;
- 5. The appropriate officer(s), partner(s), member(s) or owner(s) of the parent shall also sign and swear to the application and information included therewith, as described in this subdivision, if the employer making application is relying on the financial statements of the employer's parent in making the application.
- b. If the employer is a government agency, the criteria used to determine financial stability and guaranties may be modified to accommodate for governmental accounting and other issues related to a going concern. Any modifications allowed in these cases will take into consideration the risk to the self-insured employer community.
- 5.3. The employer making application may provide the Commissioner with any additional information deemed relevant to its financial stability. After reviewing the application and information included therewith, the Commissioner may request additional information from the employer or parent. The applicant must provide the information within the requested time frame in order for the application to be processed.
- 5.4. The employer applying for self-insured status shall pay to the Commissioner a non-refundable application processing fee at the time each application is filed. The minimum application fee is \$2,500.00. If it is determined that the cost of processing the application will exceed \$2,500.00, the application fee may be modified by the Commissioner. If the original application cannot be processed or is considered to be invalid, future applications made by the same employer are subject to additional filing fees.

- 5.5. An employer who insures its West Virginia workers' compensation risks through coverage from a private carrier may apply at anytime to self-insure its workers' compensation risk. If the application is approved by the Commissioner and Industrial Council, the self-insured status will be effective on the first day of the calendar quarter following the month in which the application was approved. An employer new to the state of West Virginia, who has never had any West Virginia workers' compensation obligations, may apply for self-insured status in anticipation of engaging in employment operations in West Virginia which will subject the employer to such obligations: *Provided*, That until the employer's application is granted, the new employer shall be required to secure its West Virginia workers' compensation obligations through a private carrier.
- a. The Commissioner will evaluate the application and assess whether the employer qualifies for self insured status. The Commissioner will make a recommendation to the Industrial Council within ninety (90) days of receiving the completed application and any additional requested information. The Industrial Council, at its next regularly scheduled meeting, will render a decision approving or disapproving the application.
- b. Each approved applicant for self-insured status is required to secure its West Virginia self-insured workers' compensation liability in accordance with the provisions of 85 CSR 19, "Risk Pools," and this rule.
- 5.6. Employers applying for self-insured status must continue to make timely premium payments to their West Virginia private carrier, if applicable, until self-insured status is approved by the Industrial Council and the status is effective.

#### §85-18-6. Reconciliation and Settlement of Applicant's Account.

- 6.1. The Commissioner will review the standing of any employer making application for self-insured status regarding the West Virginia Workers' Compensation Old Fund and Uninsured Fund and any other potential liabilities owed to the State of West Virginia pursuant to chapter twenty-three of the West Virginia Code or the rules promulgated thereunder. The Commissioner will not approve any application for self-insured status made by an employer whose record upon the books of the Commissioner shows any money owed pursuant to chapter twenty-three of the West Virginia Code or rules promulgated thereunder until the employer has paid in full all existing liabilities.
- 6.2. This section applies equally to any outstanding liabilities as described herein owed by any employer with whom any owner, officer, partner or member of the applying employer was previously affiliated as an owner, officer, partner or member. In other words, the employer making application for self-insured status will not be approved until all liabilities of all employers with whom any owner, officer, partner or member of the applying company is or was previously affiliated have been paid in full.

#### §85-18-7. Coverage for catastrophic occurrences.

In addition to all other security required to be posted for the purpose of maintaining self-insured status under this rule and 85 CSR 19, the Commissioner may require self-insured employers to post an additional amount of security, procure a policy of excess insurance, or both, for the purpose of covering potential catastrophic occurrences. Whether a self-insured employer is required to post security and/or maintain a policy of excess insurance pursuant to this section, and, if so, the amount of security and/or excess insurance required, shall be determined by the application of objective criteria by the Commissioner which will be used to determine the need for additional financial protection against catastrophic risks. Any policy of excess insurance or security required in this section shall be in a form approved by the Commissioner. The self-insured retention amount of any excess policy as described in this section shall be subject to the approval of the Commissioner.

#### §85-18-8. Security and Bond.

- 8.1. In accordance with the provisions of the rules of the Commissioner, self-insured employers must secure certain obligations for payments. In such instances where security or bond is required by the Commissioner, the security or bond shall be tendered to the Commissioner in accordance with this section.
- 8.2. Acceptable types of security and bond include, but are not limited to, occurrence type security or bond, marketable securities, and letters of credit. The Commissioner has sole discretion to determine that a particular type of security or bond is acceptable or unacceptable.
- a. If the self-insured employer obtains an occurrence-type security or bond, the security or bond is liable in the place of the employer should the employer be unable to meet its obligations for any or all injuries or deaths that may occur during the time period for which the security or bond is effective. The security or bond remains liable at the time any awards for the injuries or deaths are subsequently made and for the entire time period in which benefits will be paid under the awards, including death benefits to surviving dependents.

No language to the contrary contained in any writing associated with or included as a part of the security or bond shall defeat this obligation of the security or bond posted by a self-insured employer as described herein. Every surety, guarantor, warrantor, or other person or entity who purports to stand in the place of the self-insured employer for the payment of benefits shall be considered to have given the security or bond in compliance with this subsection, and no statement or disclaimer in the security or bond shall negate this requirement. The surety company issuing the bond must meet and maintain the Commissioner's financial strength requirements. The Commissioner shall review the financial strength of the issuers of all the surety provided by the self-insured employer in the course of the Commissioner's annual review and recommendation to the Industrial Council.

- b. If the self-insured employer wishes to post marketable securities to meet its obligation for security or bond, the securities must satisfy the following requirements:
- 1. The securities must be fixed term debt instruments with a fixed and determinable principal amount;

- 2. The issuer of the securities must be a governmental entity or governmental agency or corporation of this state, or any other state or of the United States;
- 3. The maturity date of the instrument cannot be more than ten years from the date the securities are posted with the Commissioner; and
- 4. The payment of both principal and interest are denominated and payable in United States dollars with the interest payable at fixed periodic payment dates and at a fixed rate of the principal amount of the indebtedness.
- c. If the self-insured employer wishes to post a letter of credit to meet its obligation for security or bond, the letter of credit must satisfy the following requirements:
- 1. The letter of credit must be issued by a bank operating in the United States;
- 2. The letter of credit must utilize the letter of credit forms approved by the Commissioner and in accordance with this rule; and
- 3. Before it will be considered security for self-insured risks, the letter of credit must contain an "evergreen" clause as specified by the Commissioner, which holds the issuer responsible for the employer-applicant's liability resulting from all injuries incurred by or deaths of the employer's employees prior to the expiration of the letter of credit. In the event that the employer-applicant is unable to obtain the issuance of the evergreen form of letter of credit, then the employer-applicant must obtain permission from the Commissioner to use the letter of credit with a non-renewal draw clause. The employer must also provide the form letter of Authority and Acknowledgment which authorizes the draw of the entire amount of the letter of credit in the event of cancellation of the letter of credit, although the self-insured employer is not then in default under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.
- 4. The bank issuing the letter of credit must meet and maintain the Commissioner's financial strength requirements.
- 8.3. Employers who are required by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder to provide security shall post an amount as determined by the Commissioner to be adequate and sufficient to compel or secure payment of compensation and expenses to the employer's employees, or their dependents, as required by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

The Commissioner shall utilize a financial ratio summarization, based upon a comparison of the employer-applicant's solvency, efficiency and profitability ratios to a specific industry's ratios, as defined, for example, in the current Dunn & Bradstreet Industry Norms and Key Business Ratios, in evaluating an employer's financial strength and in making a recommendation to the Industrial Council as to an appropriate amount of security. Whenever possible, the

commission shall make a comparison of ratios using the employer's workers' compensation industry classification.

- a. If the Commissioner determines that, based on this rule and 85 CSR 19, a self-insured employer's securities or bonds are inadequate or insufficient, the Commissioner shall notify the employer. Thereafter, the Commissioner shall enter a decision directing the employer to increase its securities or bonds by the amount needed to reach the adequate and sufficient level for all time periods originally intended to be covered by the inadequate or insufficient security or bond. An inadequate or failed security or bond includes, but is not limited to instances where the entity issuing the security or bond, based upon the sole discretion of the Commissioner, is no longer a viable entity or, for whatever reason, can no longer meet its obligations.
- b. The Commissioner shall provide a reasonable amount of time for the employer to obtain the increased or added security or bond or develop a work out agreement and obtain the first installment payment. Absent extenuating circumstances, as determined by the sole discretion of the Commissioner, the period to secure additional security or period to develop a work out agreement and obtain the first installment payment may not exceed ninety (90) days from the date of the Commissioner's notification. The increased security or bond must meet the requirements set forth in this rule.
- c. A self-insured employer's failure to obtain additional bond or security, as required by the Commissioner's order, may result in a revocation of the privilege of self-insurance and termination of the employer's self-insured status. The Commissioner shall issue a notice specifying the effective date of any such action or actions.

#### §85-18-9. Self-insured Employer's Modification of Business.

- 9.1. In the event a self-insured employer reorganizes its business, assumes additional liability, acquires new assets or operations, buys an additional business, merges with another business, or otherwise changes its operation in any manner which is likely to impact its West Virginia workers' compensation claims liability, or ability to satisfy its financial responsibility requirements, the self-insured employer must immediately notify the Commissioner of the business modification. The notice of modification must contain specific information as to the nature of the modification, including, but not limited to, a copy of the executed contract causing the modification and the names of other employers or businesses affected by the modification, any information filed with the Securities Exchange Commission related to the modification which was not previously submitted to the Commissioner and any pro forma financial information prepared pursuant to the modification. The employer shall also provide any additional information requested by the Commissioner regarding the transaction, within the timeframes specified.
- 9.2. If, after reviewing and analyzing all relevant information regarding the self-insured employer's business modification, the Commissioner determines that the transaction creates a substantial new risk to the self-insured community, the Commissioner may, in his or her sole discretion, require any entity involved in the relevant transaction to file a new application for self-insured status.

- 9.3. Under subsections 9.1. and 9.2. of this section, the Commissioner will review the employer's security and bond requirements following any changes made to the self-insured employer's account and, if necessary, make an appropriate recommendation to the Industrial Council for an adjustment to the security requirements.
- 9.4. If the modification of business requires processing that includes any type of an actuarial analysis, a \$2,500.00 processing fee shall be assessed.
- 9.5. If the modification causes a self-insured employer to no longer qualify for the privilege of self-insured status, the Commissioner, with the approval of the Industrial Council, may terminate the self-insured employer's status in accordance with the provisions of section 14 of this rule. Settlement of estimated liability at the time of revocation shall be determined in accordance with the provisions of this rule.

#### §85-18-10. Voluntary Termination of Self-Insured Status.

- 10.1. A self-insured employer may terminate its self-insured status with the following conditions:
- a. The employer shall remain forever liable for all accrued and contingent liabilities which the employer has incurred as a result of being self-insured;
- b. The employer shall provide written notice to the Commissioner a minimum of thirty (30) days prior to the termination of its status. Upon the expiration of the thirty (30) days of notice, self-insured status shall terminate the first day of the succeeding calendar quarter.
- c. The employer shall post bond or security in an amount estimated sufficient to cover the costs of all future accrued and contingent liabilities resulting from the period of self-insured status. The security or bond is subject to the Commissioner's approval of the form, type and amount of the security or bond.
- 10.2. A self-insured employer may enter into a contract for sale of its business or for transfer of some or all of its assets to another entity, including, either expressly or impliedly, an agreement as to the assumption by the purchasing entity or transferee of the self-insured employer's accrued and contingent liabilities resulting from the employer's self-insured status: *Provided*, That in the event such a contract is entered into, the provisions of this rule shall be adhered to, both with regard to section 9 ("Self-Insured Employer's Modification of Business") and this section. Any contract described in this subsection and any resulting sales, transfers and consequential effect on the employer's self-insured liabilities are subject to approval of the Commissioner prior to taking effect.

#### §85-18-11. Self-Administration of Claims.

11.1. All self-insured employers shall administer their own claims consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder. An injured worker who is an employee of a self-insured employer is entitled to all of

the workers' compensation benefits, pursuant to chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, as those afforded to injured workers whose claims are paid and administered by private workers' compensation insurance carriers. These same benefits include the proper and timely payment of medical bills and compensation.

#### 11.2. Notifications.

- a. Each new self-insured employer shall within five (5) working days notify, in writing, the following persons, entities or adjudicatory bodies involved in active claims matters that the self-insured employer is self-administering its claims:
  - 1. Claimants;
  - 2. Claimant representatives;
  - 3. All parties to the claim;
  - 4. All adjudicatory bodies that are currently proceeding in the claim; and
  - 5. Vendors who are rendering services in the claim.
- b. Each self-insured employer shall within five (5) days notify its employees that it is self-administering its claims. This notice must be posted at each of the employer's places of business within the State.
- c. The self-insured employer is required to state in each notice, whether the notice is individually written or posted, that the self-insured employer, and not the previously utilized private carrier, is the primary contact for submitting invoices, claims inquiries, legal notices, medical reports and other communications concerning the claim.
- 11.3. Claims Contact. The self-insured employer shall provide to and maintain with the Commissioner a current name, address and telephone number of the contact person responsible for administering payments on behalf of the injured employees.

#### §85-18-12. Payroll Reports, Assessments and Surcharges.

- 12.1. Upon filing an application for self-insured status, an employer acknowledges its obligation to continue to make all payments and file all reports required by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.
- 12.2. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall file with the Commissioner a sworn statement of the total payroll of all of its employees subject to chapter twenty-three of the West Virginia Code for the preceding quarter.

12.3. In addition to properly and timely administering and paying workers' compensation claims, self-insured employers are also responsible for timely remittance of debt reduction and regulatory surcharges pursuant to W. Va. Code §23-2C-3 and W. Va. CSR §85-6-1 et seq. and, if applicable, remission of self-insured pool assessments pursuant to W. Va. CSR §85-19-1 et seq. Failure to timely remit the surcharges and assessments will result in delinquency and, if the delinquency is not cured, default, which can subject the self-insured employer to penalties, including revocation of self-insured status.

#### §85-18-13. Auditing, Monitoring and Inspections; Record Keeping.

- 13.1. Preservation of records. Every self-insured employer shall keep, preserve and maintain complete records showing in detail all expenditures for payroll and the separation of such expenditures in the various classifications of the employer's business. The employer shall keep such additional information necessary to determine classification of the employer's activities as well as other information necessary for a risk assessment. Records shall be preserved for not less than ten (10) years after the respective times of the transaction upon which the records are based. The employer shall retain all records for periods in excess of ten (10) years in matters involving possible fraud or failure to report or disputes with the Commissioner until the Commissioner or appropriate administrative, judicial or appellate body finally resolves the matter and the time for appeal has been exhausted.
- 13.2. Pursuant to W. Va. Code §23-2-2(a), each self-insured employer shall furnish to the Commissioner, upon request, all information required to determine risk assessment, the amount of surcharges and assessments owed, or to carry out any other duties under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder. This information may include, but is not limited to, the number of employees employed by the employer during a pertinent period and the names, social security numbers, payroll during relevant periods, occupations and classification information of the self-insured employer's employees,.
- 13.3. Preservation of claims records. Every self-insured employer is required to keep, preserve and maintain all records relevant to workers' compensation claims.
  - 13.4. Inspections of records; failure to maintain records.
- a. The self-insured employer shall keep available for inspection at any reasonable time by the duly authorized representatives of the Commissioner:
- 1. All accounting records, books, records, papers and documents, whether in hard copy or electronic form, reflecting the amount and the classifications of the payroll expenditures of an employer, as well as the nature of the business operation; and
- 2. All records relevant to workers' compensation claims, whether in hard copy or electronic from.

- b. The Commissioner shall review claims records of the employer on an annual basis or more frequently as the Commissioner determines in his or her sole discretion to be necessary.
- c. If any employer fails to keep, preserve and maintain the records and other information required by this section, or fails to make such records and information available for inspection, the Commissioner may revoke the employer's self-insurance status or, in the Commissioner's discretion, impose other penalties on the self-insured employer described in this section.
- 13.5. Auditing records; adjustments. The Commissioner may at any reasonable time, audit any or all books, records, papers, documents, operations and payroll of an employer for the purpose of verifying the correctness of reports made by an employer or such other reports as may be required by the Commissioner or by State or federal law. The Commissioner may make adjustments, including adjustments to the amount of payroll expenditures, surcharge rates and assessment rates.
- 13.6. In order to inspect, audit or review information specified in this rule including, but not limited to payroll and claims records, the Commissioner may direct that an agent or employee of the Commissioner audit the information referred to in this section during the regular business hours of the employer or at another reasonable time and place within the State of West Virginia. The employer shall permit the audit to occur and shall cooperate with the auditors so that the audit may be successfully completed. Failure to cooperate with an inspection or audit may result in revocation of the employer's self-insurance status or, in the Commissioner's discretion, impose penalties on the self-insured employer.
- 13.7. Either as an addition to or as part of the audit permitted under this rule, the Commissioner may convene an administrative hearing or conduct a deposition for the purpose of receiving the information in testimonial or evidentiary form. The Commissioner, his or her designee, an inspector or a designated hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounting records, accounts, papers, records, documents, and testimony at any such hearing or deposition. Any administrative hearing or deposition shall be convened and conducted in accordance with 85 CSR 7, "Rules for Selected Hearings," and the Commissioner may have any employer or officer, agent, or employee of any employer examined under oath or affirmation. A deposition may be held pursuant to this subsection even if a hearing regarding the employer has not been previously noticed or requested; provided that adequate notice of the deposition is given to all interested parties known to the Commissioner.
- 13.8. The request for information provided for by chapter twenty-three of the West Virginia Code or rules promulgated thereunder, the audit provided for by this rule, or the hearing provided for by this rule may be conducted at any time when necessary to carry out the purposes of chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.
- 13.9. Noncompliance Penalties. Penalties may be assessed against self-insured employers who fail to comply with any provisions of chapter twenty-three of the West Virginia Code or rules promulgated thereunder with regard to their self-insured status, including, but not

limited to, failing to timely administer claims, failing to timely pay benefits, failing to properly, timely and accurately report requested information and failing to remit surcharges and assessments as required. The penalty amount will be based upon the employer's overall compliance as determined by the Commissioner's review of the employer's records and conduct.

- a. The penalty assessed under this subsection is in the sole discretion of the Commissioner, not to exceed \$500 per occurrence of non-compliance.
- b. The assessment and payment of penalties under this section shall not prevent the Commissioner from making recommendations to the Industrial Council concerning the employer's self-insurance status.
- c. In addition to penalties as described in this section, if the Commissioner, in his or her sole discretion, believes that it would be effective, the Commissioner may place a self-insured employer on a corrective action plan to remediate non-compliance issues. The corrective action plan shall be established with standards, time frames and other parameters as deemed appropriate by the Commissioner. Failure by a self-insured employer to comply with a corrective action plan may result in the imposition of additional penalties, including monetary penalties or revocation of self-insured status.

#### §85-18-14. Maintaining Self-Insured Status; Annual Review.

- 14.1. The employer's status as a self-insured employer shall continue on a year-to-year basis so long as the employer continues to maintain the requisite financial standing and continues to satisfy the other requirements imposed by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, and any order of the Commissioner.
- 14.2. Annual review. The Commissioner will perform a comprehensive claims, financial, compliance and security review of each self-insured employer on an annual basis. The Commissioner may conduct an audit of all claims records, accounting records, books, records, papers, operations and documents deemed relevant by the Commissioner in the possession or control of the employer.
- a. The Commissioner shall notify each self-insured employer of their annual review.
- b. Upon notice of the Commissioner, each self-insurer shall file or make available for inspection, by whichever method specified by the Commissioner, all documents and information requested to perform an annual review on the self-insured employer. If any employer fails to make such records and information available for inspection, the Commissioner may recommend to the Industrial Council that the employer's self-insurance status be revoked or, in the Commissioner's discretion, impose penalties on the self-insured employer.
- c. The Commissioner shall notify the employer of the results of the annual review or interim reviews if such reviews reflect a deteriorating financial condition.

- 14.3. Financial review. In the performance of its annual financial and security review, the Commissioner shall determine whether the self-insured employer continues to demonstrate sufficient financial capability to remain self-insured. All the following benchmarks must be met in order to demonstrate a financial position that is not deteriorating.
- a. The most recent three years of audited financial statements must be analyzed through the most current Commissioner financial review model.
- 1. A score of medium to high must be met in the financial strength category.
- 2. A company cannot post net operating losses more than two years in a row.
- 3. The current ratio may not decline two years in a row and be at least one to one or may not decline 40% from one financial review to the next.
- 4. The total liabilities to total assets may not increase two years in a row or increase over 40% from one financial review to the next.
- 5. The auditor's opinion on the financial statements for the most recent fiscal year must not contain any comments indicating a deteriorating financial condition and/or express a going concern qualification.
- b. In addition to meeting all of the preceding benchmarks, one of the following three benchmarks must be met to demonstrate a financial condition that is not deteriorating:
  - 1. Cash flow from operating activities is greater than net income.
- 2. Total stockholders' equity has not declined two years in a row or over 40% from one financial review to the next.
- 3. An employer has at least three (3) of the six (6) profitability and solvency ratios fall within the industry median as reported by Dun & Bradstreet or other company specified by the Commissioner. The six ratios are:
  - A. Profit margin;
  - B. Rate of return on assets;
  - C. Return on net worth;
  - D. Current ratio;
  - E. Current liabilities to net worth; and

#### F. Total liabilities to net worth.

- c. In addition to the annual review, the Commissioner reserves the right to take action against a self-insured employer based upon any information obtained by the Commissioner between annual reviews which reflects that the self-insured employer's company is in a deteriorating financial condition. The self-insured employer shall be notified of any such reviews or ensuing action.
- 14.4. The Commissioner reserves the right to review or audit, at any time, a self-insured employer's compliance with the requirements of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, and to otherwise ensure that, with regard to claims handling practices, the self-insured employer is not operating in an illegal, improper or unjust manner. The Commissioner may assess penalties pursuant to subsection 13.9. of this rule for all instances of non-compliance.
- 14.5. Security Responsibility. The self-insured employer is responsible for maintaining adequate security for its claims liability for:
  - a. Catastrophic occurrences, if required by the Commissioner;
  - b. Claims with dates of injury prior to July 1, 2004; and
- c. In instances of a deteriorating financial condition, whether discovered during annual review or during an interim period, claims liability for dates of injury on or after July 1, 2004, as provided by this and other rules of the Commissioner.
- 14.6. Claims Responsibility. A self-insured employer with respect to all or part of the compensation fund is responsible for:
- a. The direct payment of all pecuniary compensation due and owing under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder to employees or employees' dependents;
  - b. The direct payment of health care provider and medical invoices; and
- c. Reimbursing the Commissioner for any payments made by the Commissioner that should have been paid by the self-insured employer.
- 14.7. The self-insured employer shall pay pecuniary compensation payable by the employer and reimbursements due from the employer within the time periods specified by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder and the orders of all adjudicatory bodies; or, in the absence of any of the above, employer shall pay the compensation and reimbursements in a prompt and timely fashion.
- 14.8. If the Commissioner determines that the security requires adjustment in light of the self-insured employer's current financial status or liability, the Commissioner shall recommend

to the Industrial Council that the security requirements be adjusted. Prior to such action, the Commissioner shall notify the employer of the forthcoming recommendation to the Industrial Council and the reasons for the recommendation. The employer shall be provided thirty (30) days for written response to the Commissioner. The Commissioner shall provide a copy of any such employer response to the Industrial Council if the Commissioner recommends that the employer's security be adjusted.

14.9. The Commissioner shall report to the Industrial Council any acts of non-compliance by a self-insured employer which the Commissioner deems to be a major violation in nature and/or poses a significant threat to the self-insured community and its workforce. The Industrial Council may direct the Commissioner to terminate an employer's self-insurance status if the Council believes that the self-insured employer has shown an inability to carry out the responsibilities of being in self-insured status and that no other lesser penalties or corrective action plans would be effective. The Commissioner shall provide the employer with written notice of the termination.

#### §85-18-15. Involuntary revocation of self-insurance status.

#### 15.1. Notification.

- a. Prior to recommending to the Industrial Council that the self-insured employer's status of self-insurance be revoked, the Commissioner shall:
- 1. Notify the self-insured employer regarding the forthcoming recommendation;
- 2. Provide to the employer the reasons for recommending revocation of self-insured status;
- 3. Provide to the employer fifteen (15) days for written response to the Commissioner's reasons for recommending revocation of self-insurance status;
- 4. Inform the self-insured employer that failure to respond in writing to the notification will result in the Commissioner's recommendation to the Industrial Council that the employer's self-insured status be revoked; and
- 5. Provide the notification to the self-insured in writing and by certified United States mail, return receipt requested.

#### 15.2. Presentation before the Industrial Council.

a. After the Commissioner's review of the response from the self-insured employer or the expiration of the time for response, the Commissioner may recommend to the Industrial Council that the employer's status of self-insurance be revoked.

- b. If the Commissioner recommends that the employer's self-insured status be revoked, he or she shall provide a copy of the employer's response to the Industrial Council.
- c. The Commissioner shall make its recommendation to the Industrial Council at a meeting of the Council. The recommendation may be provided to the Council during an executive session of a meeting.
- d. The employer shall be notified of the date, time and location of the meeting of the Industrial Council wherein the Commissioner will make his or her recommendation. The employer may be present during the presentation of the Commissioner's recommendation. The employer may address the Council regarding the recommendation and for such time as may be appropriate in the discretion of the chair.

#### 15.3. Approval of the Industrial Council.

- a. After the Commissioner presents his or her recommendation to the Industrial Council, the Council shall determine whether to approve the Commissioner's recommendation.
- b. All decisions of the Industrial Council regarding the Commissioner's recommendation shall be made in an open meeting of the board.

#### 15.4. Revocation.

- a. If the Industrial Council approves the Commissioner's recommendations to revoke the employer's self-insurance status, the Commissioner shall, by its order, notify the employer of the revocation of its self-insured status and the reasons for the revocation.
- b. Upon revocation of the privilege of self-insurance, the employer shall remain liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to the termination of self-insured status.
- c. In the event that an employer's self-insured status is revoked, the Commissioner may, in his or her sole discretion, order the employer to pay into the Self-Insured Employer Guaranty Risk Pool and Self-Insured Employer Security Risk Pool (if applicable) an amount sufficient to cover the estimated cost of all of the self-insured employer's accrued and contingent liabilities resulting from the period of self-insured status, or, in the alternative and in the Commissioner's sole discretion, secure the liabilities in a manner consistent with other provisions of this rule.

### §85-18-16. Name and Address of Employer; Legal Notice; Publications; Employer Correspondence.

16.1. General. Self-insured employers are required to provide the Commissioner with the name, telephone number, fax number and e-mail address of its designated primary contact person responsible for workers' compensation matters. Except as hereinafter provided, the name and address given by the employer on the application for coverage shall be used by the

Commissioner for giving any notice required by the statute or by this rule, unless a formal request for a change of name or address is made by the employer as hereinafter provided.

- 16.2. Change of name or address. Any self-insured employer changing the name or the address of its business must promptly notify the Commissioner, in writing, and request that the name or address be changed on the Commissioner 's records. Every employer required to register with the Office of the Secretary of State shall provide evidence of any name change from that office.
- a. In case of the appointment of a receivership, the full name of the receivership shall be reported.
- b. If the employer wishes to have certain notices and correspondence directed to a subsidiary, a branch office or agent, the employer must notify the Commissioner in writing of the name and address of said subsidiary, branch office or representative and specify the circumstances under which said notice is to be given. The representative shall notify the Commissioner when such representation ceases and provide a current address to which the employer's notices and correspondence are to be sent.
- 16.3. Effect of failure to request change of name or address. In the absence of a request for a change of name or address by the employer, any notice given by the Commissioner to the employer at the address and in the name shown on the Commissioner's records shall constitute constructive notice to the employer of any action taken.
- 16.4. Legal notice to attorney or agent. In any matter arising under this rule in which the Commissioner is required to give notice to a party, if a party is represented by an attorney or other representative, notice to the attorney or other representative is sufficient notice to the party so represented. "Other representative" includes the employer's third party representative, if the employer is so represented.
- 16.5. Correspondence. All correspondence to the Commissioner from an employer or its representative related to an employer's workers' compensation account, premiums, or coverage issues shall contain the employer's policy number and the employer's federal employer identification number.

#### §85-18-17. Third Party Administrators.

Self-insured employers may hire third party administrators to administer claims if the third party administrator is licensed to perform workers' compensation claims services for the self-insured employer, consistent with the provisions of W. Va. Code §23-2C-17(c). Additionally, any third-party administrator performing services for self-insured employers shall comply with relevant provisions of chapters twenty-three and thirty-three of the West Virginia Code and the rules promulgated thereunder.

#### §85-18-18. Administrative Protests and Hearings.

Any self-insured employer who wishes to contest a decision made by the Commissioner, under the provisions of chapter twenty-three, article two of the West Virginia Code, may do so under the provisions of W. Va. Code, §23-2-17 and 85 CSR 7, "Rules for Selected Hearings."